U.S. Department of Labor

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Issue Date: 31 January 2003

Case No. 2001-ERA-45

CHARLOTTE WELLS,
Complainant,

v.

UNITED STATES ENRICHMENT
CORPORATION INCORPORATED,
Respondent.

Appearances:
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For the Complainant

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For the Respondent

Before: THOMAS F. PHALEN, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the employee protection provisions of the Energy Reorganization Act ["ERA"], 42 U.S.C. Section 5851. The implementing regulations that govern this matter appear at 29 C.F.R. Part 24.1-9. Such provisions protect employees from discrimination for attempting to carry out the purposes of the environmental statutes of which they are a part, and specifically for preventing employees from being retaliated against with regard to the terms and conditions of their employment for filing "whistleblower" complaints or for taking other action relating to the fulfillment of environmental health and safety or other requirements of these statutes. The hearing, and this decision and order are also governed by those provisions, and the provisions of 29 C.F.R. Part 18.

On October the 14th, 2000, Ms. Wells filed an undated complaint of discrimination under Section 211 of the Energy Reorganization Act. The complaint was investigated and, on September 17, 2001 was found not to have merit. Complainant, through counsel, timely requested a formal hearing in this case. Pursuant to an order of the undersigned dated December 7, 2001, the hearing in this case was held on March 12 and 13, 2002 in Paducah, Kentucky. The parties were represented by counsel and were given an opportunity to present evidence and arguments, and to file briefs in the matter. Briefs and reply briefs were timely filed by the parties. After considering all of the documentary and testimonial evidence, and the arguments and briefs of the parties, the following is my recommended decision and order.

ISSUES

1. Whether respondent committed adverse action against complainant in response to protected activity under the ERA.

2. What damages and remedies, if any, the complainant is entitled to as a result of the actions taken by respondent.

STIPULATIONS

The parties, through counsel, hereby stipulate as to the following facts:

1. The Office of Administrative Law Judges, U.S. Department of Labor, has jurisdiction over the parties in the subject matter of this action.

2. Respondent is engaged in interstate commerce and is an employer subject to the provisions of Section 11 of the Energy Reorganization Act herein, ERA, of 1974, 42 USC Section 5851.

3. Complainant is now and at all times material a person as defined in Section 211 of 42 USC and/or the employee as defined in Section 211 of 42 USC.

4. Charlotte Wells was an employee of USEC during the applicable periods and remains an employee of Respondent.

5. Pursuant to Section 211 of the ERA, Complainant Charlotte Wells filed an undated complaint which was mailed on October the 14th, 2000, to the Secretary of Labor, alleging that USEC discriminated against her in violation of Section 211 of the ERA Act (42 USC 5851).

6. Following an investigation, the Regional Administrator, Occupational Safety and Health Administration issued findings on the complaint on September the 17th, 2001.

7. The Complainant mailed an appeal and request for hearing to the Chief, Administrative Law Judge, U.S. Department of Labor, Washington, D.C., in a timely manner.

8. The appeal of the Complainant satisfied the 30-day time constraints as provided by 29 CFR Section 24.4.

9. During and subsequent to March 1999, the Complainant engaged in protected activity.

(T 15 - 16)[1]

FINDINGS OF FACT

Background:

Complainant, **Charlotte Wells**, herein called "Ms. Wells," "Wells" or "Complainant," was hired in 1987 by The Lockheed Martin Utility Services (LMUS), the predecessor to the United States Enrichment Corporation, herein called, " the Respondent," "the Employer" or "USEC" at the Paducah Gaseous Diffusion Plant (PGDP) in Paducah, Kentucky. I take judicial notice that in 1997, USEC became subject to Nuclear Regulatory Commission (NRC) rules and regulations.[2] USEC is, therefore, a "license holder" [a licensee] of the NRC, and is required to maintain certain standards for license certification. The production process is governed by numerous health and safety regulations including those of both the NRC and the Occupational Health and Safety

[1]References to the exhibits of the Administrative Law Judge, and the Joint, Complainant and Respondent exhibits, and to the official transcript will be designated, "ALJX", "JX", "CX", "RX" and "T" with the exhibit or page number following the designation.

[2]Notice is also taken that in October of 1997, the company "Privatized" and USEC took over as a private, publicly held, company. The biggest change involved its accountability and how it worked. It was formerly accountable to the government and then, being a company in business for itself, accountable to the shareholders. The biggest change was managing a budget for a private business, to maximize the company's value to the shareholders. *See Douglas Jones v. United States Enrichment Corp*., 2001-ERA-21

Commission (OSHA).[3] Recent changes in the uranium business, including depressed enrichment prices and decreased demand for uranium projected for the foreseeable future, have resulted in a series of budget curtailment measures over past few years, affecting the entire workforce.

At the time of the hearing, Ms. Wells was married and had one child with her present husband, and three from a prior marriage. She received an Associates Degree in Art from Paducah Community College, followed by a semester at the University of Tennessee in Martin, Tennessee, and a half year at the West Kentucky Trade School. She has worked continuously at USEC and its predecessors from June 13, 1987 through the date of the hearing, serving in various positions. They included a Clerical/Secretarial position in Industrial Hygiene for three years; a Nuclear Safety secretarial position with more of an engineering orientation that she was used to in 1992 to 1993; Coordinator of Space in 1993 through 1996; Training as Fleet Manager in 1996 - January 1997, and then Corrective Actions Coordinator from that time until the date of the hearing.

As Corrective Action Coordinator, Ms. Wells investigated the "log put out." The log is a summary of all the problem reports turned in from the previous day, from all of the organizations all over the plant. She then attended meetings to see that proper assignments were made; received updates of information about how problem reports were to be submitted, and how they should be put on the reports. Then she printed off all of the problem reports for everyone and distributed them to every group. She assisted in helping employees investigate problems and provided answers for final reports to management on them. She also did self-assessments (evaluations of how procedures or jobs are done) for all of the groups, all as a full-time, very detailed position, (CX 1-3), which required both time in the field and computer research in the office, to compile the information.

At the outset, Ms. Wells testified that she loved her job, and that her relationship with the Functional Organization Manager, of the group then called Site and Facilities, was very professional. (Her direct supervisor, then, in 1997, was David Sampson.). She felt she was helping the plant solve problems, and was able to obtain the information needed to perform her work. In short, her work environment was "excellent". (T 26)

She alleges that her presence outside the open door of a room where a meeting on classified matters was taking place on August 5, 1998 changed all that, and that she received threats and adverse actions because of it. I have concluded that the threats and certain adverse actions took place, and that they were motivated by the fact that the supervisory officials

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[3]Additionally, notice is taken that Mined U235 uranium ore is initially converted from an oxide form into a uranium hexaflouride gas (UF6) at another location, and is transported to PGDP and a second USEC location at Portsmouth, Ohio. At PGDP the UF6 is "enriched" from 2% to 5% for use in nuclear reactors to produce energy. From there, the enriched UF6 is shipped in cylinders to a fuel fabricator where the metallic part of it, the enriched metallic uranium, is extracted and fabricated into fuel pellets in fuel rods for commercial reactors. The PGDP also receives some Russian uranium for blending and redistribution for commercial reactor fuel. *See Douglas Jones v. United States Enrichment Corp., supra.*

suspected that Ms. Wells might report their positions being taken in the meeting, to the NRC. This would constitute suspected protected activity, and the adverse actions would constitute violations of the ERA. Andrew Grace, Ron Whiteside, Charles Hicks, Janice Morris and Sammy Bell were present in the meeting. Hicks, Morris and Bell all testified. Grace and Whiteside did not. Pat Jenny, David P. Sullivan, Ron Fowler, Joe Ed Watkins and Donald Elrod also testified on other related matters.

Primary Witnesses:

USEC Senior Staff Consultant, **Charles Hicks** testified that he first came to work at USEC in 1996; that he was Manager of the Site and Facility Support until about July of 2000, and that he moved into a consultant position at that time. He first met Ms. Wells as her superior when she was Manager of Space in Construction Engineering, which was assigned to Facility Support until 1997. After that she was moved to Corrections Actions Coordinator, keeping track of the large number of backlogged ATR's, and making sure that those responsible answered them. Mr. Hicks had been Functional Organization Manager, within several Departments under Mr. Grace, including Security Organization. He knew Ms. Wells as a long time employee of USEC, and was her supervisor on August 5, 1998, until replaced by Ms. Jenny in July of 2000.

Plant Services Organization Manager, **Pat Jenny**, was first employed at USEC in 1997 as the Commitment Manager. She transferred into Health Physics from 1998 to 1999, and then to Plant Security Manager in July of 1999, replacing Mr. Grace. She moved to Plant Services Manager in July of 2000. At the time of the August 5, 1998 meeting, a key meeting involving Ms. Wells, she was employed in Health Physics and not directly involved with Ms. Wells or the meeting.

Former Security Manager in the Technical Security group, **Sammy Bell** had been hired by USEC's predecessor in November of 1976, and testified that he left in October of 2000. Pat Jenny was his immediate supervisor when he left. At the time of the hearing, he was Security Supervisor for The Bechtel-Jacobs Company, a subcontractor to the Department of Energy (DOE), in Paducah, with offices directly on the USEC Plant site. Prior to Jenny, he had reported to Andrew Grace.

Former USEC employee, **Janice Morris** testified that since November 2000 and at the time of the hearing, she had been employed as a Security Specialist at the Bechtel-Jacobs Company. When she left USEC, she was in Information Security, which was part of the Security Organization. She was supervised by Sammy Bell, who reported to Organization Manager, Pat Jenny. Jenny had taken the position of Andrew Grace, and Jenny was later promoted to Organization Manager, replacing Charles Hicks. Ms. Wells had worked at USEC from December of 1989 to November of 2000. While she worked for the same Security Organization, she was in another department, but both Jenny and she worked with Mr. Hicks.

USEC Compensation Analyst, **Joann Pharis**, testified that her department, Compensation is part of Human Resources. She testified that she spent twenty years as a Clerk, and then as a Manager, with the past few years in Compensation, during which she dealt with promotions and personnel actions involving Ms. Wells.

Secondary Witnesses:

David P. Sullivan, testified that he was hired by USEC's predecessor on May 2, 1977 as a Security Police Officer; he worked his way to Lieutenant, Shift Commander, Training Coordinator and, finally, Chief of Police Operations. At the time of the matters relating to Ms. Wells, he was a Security Specialist, reporting to Andrew Grace and Charles Hicks, the Organization Manager, and replaced Sammy Bell as Technical Security Manager in October 2000.

Group Training Manager over Production and Support Training, **Ron Fowler**, testified that before that position, he was in the Training Department at USEC, and was transferred directly under the Plant Manager, for a couple of years. Ms. Wells never worked directly under him, but he did work with her on a couple of tasks.

USEC Security Group Manager, **Joe Ed Watkins**, testified that he replaced Pat Jenny in her position of Site and Facilities Manager in November of 2000. He was hired in May, 1986 as Security Inspector, and was promoted in October of 1988 to Protective Force Lieutenant. He was later promoted to Shift Captain, Shift Commander, Protective Force Chief, and then Security Group Manager.

USEC Manager of Fire Services and Emergency Management, **Donald Elrod**, testified that he worked at the Paducah plant for over 34 years, and that he had been a Maintenance Mechanic for approximately 20 of them. He then held a staff position in the training department for about 14 months, and then in Emergency Management for the remainder of that, approximately 11 years. He became head of the Fire Services Department in the fall of 2000, after the July, 2000 IRIF.

Protected Activity/ Adverse Action - The August 5, 1998 Meeting and Threat:

On August the 5th, 1998, Ms. Wells had a very high-rated problem report that had to be answered and turned-in. She had been working with Technical Security Manager, Sammy Bell, on the report, and had come up with a solution. He was going to agree on it and sign it. She went to his trailer, (C-102, Trailer 2) to acquire his signature. When she went into the trailer, she went by the office of Technical Security employee, Janice Morris. There was a group of people meeting in her office. Ms. Wells looked in the office and saw Mr. Bell and Ron Whiteside, but did not go into the room. Bell acknowledged her. She was never made aware by Bell or any other persons as to who else was in that room, or what they were talking about, and had no idea who was in there. It was later revealed that her supervisor, Mr. Hicks, was in the meeting, too; a fact that she did not know until August of 2000, two months before she filed the complaint in the

present matter. At that point, Security Manager, Andrew Grace, poked his head around the corner and asked her if there was anything he could be of assistance with. She explained, that she just needed Bell's signature.

Ms. Wells continued to work on the problem report. When Mr. Bell came out, he took the report and went to his office; finished it up; wrote his signature; gave it to Ms. Wells, and she then went back to her office. Approximately 15 to 20 minutes after her meeting with Bell, she received a call from Mr. Grace. He told her that she had been listening to a conversation which she should not have been listening to, and if any of that conversation got out he would know who to come to. She tried to explain to Mr. Grace that she did not know what they were talking about; that she was too absorbed in working on the problem report that had to be turned in that day, and that he had nothing to fear because she heard nothing. Grace then repeated himself , saying: "I'll know who to come to." (T 30) His voice was very hostile, very angry, and very threatening. The conversation ended when he hung up the phone.

Ms. Wells testified that she was horrified at the way that Mr. Grace had talked to her on the phone; that she was very frightened, and was very confused as to why she would have gotten a call of this nature. She stated that she was only doing her job, did not know why, and did not understand where it was coming from. When she went home, Ms. Wells testified that she was still "terrified", and wasn't able to sleep all night. She thought: "Something's got to be wrong. Something is wrong." She was even scared going to work the next day. (T 30)

Further cross examination tested allegations of discrimination in relation to protected activity involving her NRC and DOL depositions in 1999, the thrust being that the alleged 1998 telephone threat by Mr. Grace preceded those depositions, and that other conduct such as the statement by Mr. Grace that he would "know who to come to" was not necessarily "protected." (T 105-106) I find that the result of the following exchange between respondent's attorney and Ms. Wells was a credible account of what took place by Ms. Wells, and as I indicated on the record, that the outcome would depend on how I interpreted the statement:

> Q (Mr. Whitlow) Just so we're clear, you admit the protected activity that you were talking about is limited to your testimony in 1999?
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> A (Ms. Wells) I was told I was protected and would be from there on out.
>
> Q But when we use the term "protected activity" in this context, you're talking about your testimony to the NRC and the Department of Labor in 1999?
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> A Yes.

Q Therefore, when Mr. Grace made his telephone call to you in August of '98, you had not made any protected activity, had you?

A I called Sammy Bell, who was technical security.

Q I'm asking, when Mr. Grace called you and you said he made a threat on the telephone, you hadn't engaged in any protected activity in August of '98, you talked to Mr. Bell after the phone call.

A The next day.

Q So, when Mr. Grace made his call, you had not engaged in any protected activity, correct?

A I guess. I'm not sure what you're asking.

Q Okay. Now, Mr. Grace did not specifically -- threaten any specific negative action against you, did he?

A The threat itself, and who he was, was enough during -- to be terrified of.

Q But he never threatened any specific action against you, did he?

A Explain, please.

Q I'm asking, did he make any threats to do anything specific to you?

A He said he'd know who to come to.

Q Yes, and did he say what he would do about it?

A Didn't have to. That was frightening enough.

Q So the answer is no. He did not make any specific threats to you, other than if information got out –

JUDGE PHALEN: Depending on how I interpret the phrase that he'd know who to come to.

MR. WHITLOW: Exactly.

(T 105-106; Emphasis added.)

JUDGE PHALEN: Beside that.

THE WITNESS: No.

Ms. Morris confirmed the August 5, 1998 meeting in her office that included Messrs. Grace, Hicks, Bell and and Whiteside; that it concerned a security incident that had occurred at USEC and whether it should be reported to the NRC, and that the door was open when the meeting started. Ms. Morris explained the incident as follows:

> [I]f there was a security incident that occurred at that time that was in violation of our classified matter (sic) plan that had been presented to the Nuclear Regulatory Commission [and . . .] it was to be reported within one hour of the incident.[4]
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> * * *
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> A classified document had been created by individuals there at the plant . . . dealing with classification status of documents, whether they were upgraded or downgraded in their classification, or whether they had been declassified. And this particular document was discussing upgrades from unclassified to classified. And it showed a vulnerability, in other words, other copies of that same document could be out there anywhere, whether it be at the plant or somewhere else, and until all of those documents were upgraded, then the other ones were subject to someone finding them and seeing what this classification was. So, therefore, it was vulnerability. And it was taken to our classification officer for USEC at the time, which was Ron Whiteside, and he was asked to review the document and he, in turn, had determined it to be unclassified, and it was sent to different locations, and one was out of state to Oak Ridge, Tennessee. And it was on that date that I received a call from Oak Ridge, my counterpart, explaining to me about that they had received a document that wasn't declassified.
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> * * *
>
> [F]or the majority of our discussion, it was different reasons why they felt like that they did not think that it would have to be reported to the Nuclear Regulatory Commission. . . . We felt very strongly that this was an incident that -- that had to be reported to the Nuclear Regulatory Commission, and we -- I had very adamant conversations with Charlie Hicks. I was on my side of the desk, and I can remember very vividly he was sitting in front of

[4]There are two entities at the Paducah site. (1) The entities that are with USEC that are regulated by the Nuclear Regulatory Commission; and (2) Bechtel Jacobs and other subcontractors that are regulated by the Department of Energy. If incidents occurred that affected Bechtel Jacobs or DOE, those incidents did not have to be reported to the Nuclear Regulatory Commission. The ones that were pertinent to USEC and USEC's employees, namely those that were regulated by the NRC, had to be reported within one hour.

> me and me saying, "Charlie, let me be the devil's advocate." That's exactly what I said. You know, . . . we created this document. It was reviewed by our classification officer, and I think NRC would have a real problem if we did not report this incident, a classified document that's went out, improperly reviewed. . . . [He] finally agreed, and it was reported.

She testified that it was her perception that the discussion in the room was primarily about how to get around not reporting it, and that they (Morris and Bell) wanted it reported, but that Grace, Hicks and Whiteside did not think it should be, as it started out. Eventually, she confirmed Mr. Hicks relented and reported the incident, and that her view prevailed at the meeting.

Ms. Morris testified that, at some point during that discussion, Ms. Wells walked up to the door when the discussion was going on about not reporting this matter. Ms. Morris testified that Ms. Wells was standing just right outside the door and never entered her office. Ms. Wells stated that there was different traffic going on in the trailer (a double-wide trailer), and that she had wanted to talk to Mr. Bell. Ms. Morris thought that Mr. Bell left, he talked to Ms. Wells briefly and then came back in.

When Mr. Whiteside, Mr. Grace and Mr. Hicks saw Ms. Wells standing in the doorway. Ms. Morris believed it was Mr. Grace that went and closed the door. There was discussion about Ms. Wells, specifically between the three of them, with, as best she could remember, Whiteside saying to Grace and Hicks, "You better talk to her." (T 152) They were fearful that she would repeat what she had heard them talking about. It was evident that was the reason that they were real upset. Grace gave enough time for Ms. Wells to get back to her office, and picked up the phone and called her. Grace got Ms. Wells on the phone, and, she testified, "this is pretty close to what he said:" "Whatever you think you heard while you were outside of the security office over here, you are not to repeat it because I'll know where it came from." (Emphasis Added. T 153) And, she stated, it was a very stern, very threatening voice.

The meeting broke up sometime after that. Ms. Morris testified that she felt that Messrs. Hicks, Grace and Whiteside were all upset that she had been so adamant that it had to be reported, and, after having witnessed this threatening call from Grace to Ms. Wells and animosity had been held toward her; it was very, very difficult to stand up to Mr. Hicks and continue to say this must be reported. She stated: "There was no doubt in my mind he was threatening Ms. Wells." (T 154)

Mr. Bell testified that on August 5, 1998, he was in the meeting with Ms. Morris and Messrs. Whiteside, Grace and Hicks, which had been called regarding an issue that would be a reportable security issue to the NRC. It was prompted by a call from Oak Ridge, Tennessee about some information that was sent unclassified off of site from Paducah to Oak Ridge that should have been reported as classified and a breach of security protocol. Whiteside, Hicks and

Grace were exploring ways on how to avoid not reporting it. Initially the door was open. At some point during the discussion Mr. Bell saw Ms. Wells appear for something he had told her to bring for signature.

When Grace realized that Ms. Wells had been out in the hall, he shut the door. The discussion continued on whether they would report the initial incident, and there was also a discussion about Ms. Wells and the possibility that she may have overheard what they were talking about. Bell testified that he thought either Grace or Whiteside said that the busy-body (Wells) was out in the hall and they needed to be careful about what she might have heard. So Bell confirmed that Grace walked over and picked up the phone up, with it on the speaker phone initially, and called Ms. Wells and said: "I know that you were out in the hall when we were having a conversation and I just want you to know that anything that -- that I hear that's related to this conversation, I know where it came from." (T 180-181) They all continued to discuss the initial incident and made a decision that it needed to be reported. However, there was no other discussion about Ms Wells after that telephone call.

Mr. Bell testified that the day after the August 5th meeting, he talked to Ms. Wells about her telephone call from Grace. She first asked him if there had been a report filed on the initial incident being discussed in the meeting, her concern being that she had been standing there, with people coming in and out of the trailer that could have overheard the discussion causing a potential security compromise. However, she was not there long enough before the door was closed to hear much of what was being said at the trailer meeting.[5] He told her that although there had not been a compromise based on that conversation, and as the issue of whether or not to report it was very sensitive, he assured her that a report was being filed on it. She then asked whether the incident of leaving the door open should be reported, based upon the fact that uncleared people were in and out of there. (In fact, she was a "cleared" person, from a security standpoint, but the question of whether she needed to be privy to it, was also at issue. She was cleared on a "need to know" basis.)

Mr. Bell testified that he did talk to Ms. Wells about her conversation with Mr. Grace, but did not file a separate report on it. He acknowledged that the report was filed by him on a number of incidents, of which the incident being discussed in the meeting was one. He never discussed the conversation between Ms. Wells and Mr. Grace either with Grace or with Mr. Hicks, and he did not hear them make any threats concerning her.

Sometime in the year 2000, perhaps in July or August, Mr. Bell had a conversation with Ms. Wells about the August 5, 1998 meeting, and for the first time he told her everyone who was in that meeting. She appeared surprised to find out that Mr. Hicks was in that meeting. It was

[5]Upon questions from the undersigned, Mr. Bell concluded that Ms. Wells could not hear exactly what was being said in the trailer meeting. She knew that there had been an incident, but she did not know what had been involved in the incident except that she had heard that there was a dispute about filing a report with the NRC, but not the specifics. Mr. Bell confirmed that Ms. Wells was not doing anything wrong in waiting to see him since he had summoned her.

immediately after this, in October of 2000, that Ms. Wells put together the things that had happened to her related to Mr. Hicks' actions toward her, that she filed her DOL complaint, leading to the present hearing.

Mr. Hicks testified that he and Mr. Grace were friends; that Grace was his supervisor and that Whiteside had been working in a Department of Energy (DOE) program in the large scale declassification program on the question of whether certain documents should be reported. Hicks testified that the secretary had included classified documents sent to the DOE in Oakridge, Tennessee that should not have been declassified. On the necessity to report the matter, Mr. Hicks felt that the program was strictly a DOE program, for which they were merely a subcontractor for DOE; that USEC had no interface with the program, and that since the program was owned by DOE, if there was to be a report on it, it should go to DOE, not to the NRC. Morris and Bell believed it should be reported to the NRC. Hicks stated that there was no effort to cover it up, and that it finally was reported to the DOE.

Mr. Hicks stated that he was either not present, or did not hear, any statement by Mr. Grace to Ms. Wells regarding her not divulging any information that she may have heard in the August 5th meeting. When asked further about his presence in the August 5, 1998 meeting, Mr. Hicks did not recall being in the meeting when Mr. Grace had the call with Ms. Wells, even though Mr. Bell and Ms. Morris testified that he was there, and did not recall talking with him about not reporting the classified document issue to the NRC. He testified that he later learned from Ms. Wells herself, in late June or early July of 2000, just as he was going to leave USEC, that she had been a witness or had given an interview to either the NRC or DOL concerning the August 1998 meeting. Ms. Wells also told Hicks for the first time, that she believed that Grace had acted unprofessionally at that meeting. He clarified that he did not recall not wanting to report the initial matter being discussed to anyone, just that it was not within the purview of the NRC. He also did not recall any statement from Ron Whiteside about watching out for Ms. Wells, and denied seeing her out in the hall.

Ms. Wells came in to talk to him before he left. He testified that she told him that "over the years she had enjoyed working with" him; that he "had helped her career and if there was anything she could do" for him in the future, "she would be willing to help." (T 239-240)

Group Training Manager Fowler testified that around the Summer of 1998 or 1999, he overheard a conversation between Andrew Grace and Charlie Hicks during an incident between Sammy Bell and Janice Morris, while emerging from the cafeteria, with Grace and Hicks behind him, by perhaps five feet or so. Hicks said to Grace: "Do you know that Ms. Charlotte Wells overheard the conversation in that room?" Mr. Grace said, "Well, what can we do about it?" At that time Mr. Fowler turned around and looked at them, and basically they walked away from him, where he couldn't hear them. Later, sometime in the year 2000, he ran into Ms. Wells, and just casually made the comment that he'd overheard this, and she might want to know it. She asked: "Would you repeat this," and he responded: "It's the truth. I'll tell the truth, yes." (T 137-139)

With regard to the previous testimony by Ms. Wells that Mr. Hicks might have said something about "silencing her," Mr. Fowler testified that he "might have inferred" something to that effect when he said "What can we do about it?" but he did not complete the sentence on that point, except by saying that he did not "know exactly the exact words I told her, but the best I can remember right now is, "What can we do?" or something in that vein. (T 139-140) He could not recall the exact time of the conversation, except to say that it concerned the time of the Sammy Bell/ Janice Morris discussions.

I do not believe that Mr. Hicks did not know of the conversation between Grace and Wells or that he never discussed the presence of Ms. Wells outside the August 5, 1998 meeting room with Mr. Grace. Because of his lack of memory and directions on these important matters, I do not give any significant credit or weight to his testimony.

Pat Jenny was asked by the undersigned what she knew about the Grace/Hicks/Wells issue. She responded: "I knew that there was issues going on. I deliberately chose not to be informed of the details of those issues." (T 331) When asked how she found out about those issues, she responded that when she "took over the position Howard Pulley [General Manager at the time] said there are some issues right now going on with the NRC and . . . Bell and Morris." When asked whether Pulley told her about what happened in the meeting, she responded, "No, he did not." She stated that he said, "That's why we're removing Andrew from his position and you need to come into this and understand that's it's important that you deal with things in a very upright manner." Ms. Jenny testified that she told him then that she did not want to know the specifics of the issues so that she would not be dealing with history, and so that she could deal with each individual in a current one-on-one fashion with what they were doing for her. (T 331-332) She was then asked: "so, regardless of what he said to you, your specific action was to stay out of it, is that your testimony?" She responded: "That is my testimony". (T 332)

When asked "[D]id you ever discuss that position that you were going to take with Mr. Hicks"? She responded that she did and reported directly to Mr. Hicks, so "yes" she did. When I asked her whether Mr. Hicks told her anything about what had happened, she said: "no, because my very first discussion with him is that I did not want to know the specifics of those events." She also responded: "He said . . . 'it's going to be difficult in your dealings with Sammy and Janice,' and I said 'well, I'm going to deal with them on what they do for me, what is their work activity and how I react with them and not on the history of the event.'" (T 332-333) She was then asked, "in that chain of people that you discussed, Hicks, Sammy, whomever, did you ever discuss with any one of those people or anyone that was in that meeting, any of the details of what had taken place?" She responded: "No. Sammy . . . kept trying to tell me about the events, and I kept telling him I do not want to know the specifics of these events so that I can deal with each individual based on my current activities with him and not on the history." She was asked: "Were you ever queried by the NRC or the Department of Labor about those events," to which she responded "[t]hey asked me if I knew about them and I said, no, I do not;" and asked: "And that's been your testimony consistently with all of those people," and she responded "that is correct." (T 333) In summary - she was asked, "If we were to look through the records, or look

through statements, your statement was . . . didn't want to know about them and that's the way you were dealing with it as you just testified?" She responded: "That is correct. The remainder of my testimony with the NRC would be about current events that I would have with these individuals." (T 333) At her testimony that day, Ms. Jenny seemed to know about the NRC investigation. She did not seem to know about it when they were requesting information about title changes, when the error was made on the Security Analyst position.

I found that Ms. Jenny's testimony was consistent, complete and credible on this matter; that she chose her own course of action on it, that was itself consistent and that it was uncontradicted by any other evidence.

Additional Duties and Fire Services

Shortly after the August 5th meeting, Ms. Wells testified that she received an assignment from Mr. Hicks to do the investigation on the problem report that Bell had filed, on it. The report stated that classified information had gotten off plant site that should not have gone, but could not go into detail. She asked for Terry Sorrell of OERP (unidentified initials) to assist her. They found wrong-doing in several areas in that attention had not been paid to matters that contributed to the information getting off plant, including the identification of Ron Whiteside as the initiator. Ms. Wells had no other connection with that report, but did have contact with Mr. Grace on other ATR's for the group.

A couple of months later, in October of 1998, Mr. Hicks gave her the Fire Service records to maintain as an additional duty, after their former keeper, Jerry Bartllett, was laid off. This job was enormous, involving several records for each building. (She prepared a summary of those duties for the present proceeding. - CX 2) Mr. Hicks told her that she would be receiving assistance on the job, but, as a result of the layoffs, she did not initially say anything further about it, even though she was working overtime, most of the time without additional pay, and just performed the work without the assistance. She testified that the additional workload was "just horrible," and that she was not being effective or efficient on her other jobs. (T 37-38) At some point, however, she did ask for help, but, (apparently) did not receive any. While she did not initially allege this as an adverse action, it did affect the environment that she worked in, and what she later had to go through. Ms. Wells testified that initially she did not associate the amount of work that she had been given with the threat that she felt she had received over the August 5th meeting.

Mr. Hicks confirmed that after he had assigned Ms. Wells to the ATR program, he gave her additional duties at Fire Protection Services since the records were in complete disarray. He told her that they needed organization and transmission to document control. He thought that she had enough time to work on them, in addition to the ATR's, based on the fact that the ATR's were declining; she was not the one actually answering them as a general rule and was merely

making sure that those that had to do so, did so. She did not object to the assignment, and did a good job on it. Beside her ATR and Fire Protection Services work, she did some internal assessments and some surveillance for him.

When asked about the additional duties given to her after the August 5th meeting, and whether she had told him that it would be difficult for her to perform the new duties, Mr. Hicks first stated, "No, sir, not that I recall," and then about saying it but not recalling it, he first said, "Sir, we're talking about things that occurred four years ago. There are a lot of things that could have occurred and I could have forgotten them. I'm telling you, to my best recollection –" and then, "I do not remember her saying that." (T 261) He also testified that he did not know that Ms. Wells had testified before the NRC, and that he had no conversations with either Mr. Grace or Ms. Wells about it. For reasons stated above, I do not credit any of those denials.

Ms. Jenny confirmed that she had reviewed the question of whether or not the position that Ms. Wells had as Corrective Action Coordinator was being considered for elimination, along with other full time and part time positions. She finally determined that Vernon Belt could be laid off, but by combining some of his duties with those performed by Ms. Wells, her position could be retained.

Ms. Jenny confirmed that Ms. Wells had surgery and a cancer scare, losing a great deal of work during the year 2000. When she came back from Family Medical Leave Act leave at the end of the year 2000, and after the plant IRIF, Ms. Jenny talked to her concerning her work and title, and discussed what she would do. In reviewing the Corrective Action Analyst position, she had made a determination that it was not going to be a long term, full time viable position. She expanded Ms. Wells' duties to take on Work Control issues for the Plant Services Group, and provided in depth explanation to her about the resulting creation of the Staff I, II, and II positions due to combining of duties, which I credit. Rather than reducing some of her responsibilities at that time, some were changed, including assistance with her Fire Services recordkeeping. She talked to John Smith to use her less for fire records, and do more in the Work Control arena. In 2001, Ms. Jenny relieved Ms. Wells of the Fire Services duties completely since she was not able to perform them all.

It is my conclusion that there is insufficient evidence to conclude that the additional duties given to Ms. Wells were discriminatory, or beyond the scope of the changes being made at USEC at that time.

Staff Meetings, Screening Meetings and Individual Meetings/Demeanor

After the NRC deposition, Ms. Wells testified that she began to feel very humiliated in staff meetings. Mr. Hicks talked down to her and subjected her to humiliating remarks from Shirley Bentley, his secretary. They would continually change the format of her report, then he

would say that it wasn't what he wanted. He "nit-picked " and it was never right. No one else was being treated that way, and it was not the way she had been treated in those meetings in the past. This was verified by Sammy Bell and Janice Morris.

As a result, Ms. Wells testified that she did not feel sure about her job; was afraid, and did not know why it was happening. She was not getting the information to perform her job as effectively as she felt like it should have been done. She felt that she was getting the cold shoulder in trying to relate to Mr. Hicks and getting information, and did not know what was going on.

The atmosphere after Ms. Jenny took over continued to be "chilling", she testified. Others were reporting on her work. Jenny would cut her off, and Ms. Bentley, Jenny's and Hicks' secretary who had no authority over her, told her not to be writing things down, in front of the group, which she took as humiliating. At another meeting, Bentley told her that she could leave, after she had been told by Jenny that she wanted her to stay. Ms. Bentley did not testify, and therefore did not deny these actions. I have discredited Mr. Hicks' testimony. Therefore, Ms. Wells' testimony stands on the actions of Ms. Bentley. There were times when Ms. Jenny was not present at staff meetings, so I credit Ms. Wells' testimony on what Ms. Bentley said and did at them. She felt that she was then being treated differently than both Bentley and Jenny, and was not being included on Jenny's distribution list. As a result, on August 22, 2000 she wrote an e-mail and asked Jenny to put her on the distribution list. She did not state whether she was then placed on the list, but it appears that she was.

In October 2000, Ms. Wells filed her complaint with the DOL that led to the present hearing based upon her belief that she was being discriminated against. Her reasons were as follows: She felt that after the threat of Mr. Grace, her professional relationship with Mr. Hicks changed. She testified:

> It was no longer a professional relationship in which we could exchange information about the job. That started to cease, and did cease.
>
> The way I was treated in the staff meetings, the way I was treated as an employee altogether was changed. The demeanor was very chilling. It was a very hostile environment, a very stressful environment.
>
> Plus, the fear that what was going to be done to me since Mr. Grace's threat followed me all the time that he was there at the plant. Very fearful. Afraid to even go to work. Afraid to get out of my car, go to my office.

> I even checked my office over to make sure somebody hadn't planted something in there that shouldn't be in there. It was horrible. Nobody can understand. And through all of this it affected me terribly healthwise, too.
>
> And I think I've mentioned that, and even blood pressure. Couldn't sleep. Just -- it's hard to explain to anybody. That's the reason it's so difficult to explain to you all the -- how as an employee, trying to do their job, experiencing all of this.

(T 93)

In addition to the above changes, Ms. Wells noticed a "demeanor" change in both Mr. Hicks and his secretary; exhibited particularly in staff meetings after the NRC deposition. The first sign was that he would not be there for their one-on-one weekly meetings, at which he would review matters discussed priorities set at his staff meetings and give her information critical to performance of her duties. After her meeting with DOL, there were practically no meetings at all, even though they were essential to her effectiveness. By 1999, there were none at all.

In addition, Ms. Wells was taken off screening meetings by Mr. Hicks, keeping her from general information on what was happening in the plant. Ms. Wells met with Mr. Hicks to explain why she needed to attend them, but was told they were reducing the number of people being sent to those meetings, although he would not say by how many. Other employees were cut, but they were being put into other positions. She was the only one in her organization removed from the meetings. Her replacement did attend, even though he was taken out of the Corrective Action Coordinator position.

One of her other functions related to the screening committee was evaluating the human error reports. This was taken from her, but, after the lay-off consolidation, her replacement, Rick Brennaman, who had also been a screening manager, would bring the human error report to Ms. Wells to do, even though he had been assigned the task.

When Ms. Jenny took over, she had Ms. Wells attend the staff meetings, but read parts or all of Ms. Wells' report concerning the status of ATR's herself. Ms. Wells complained to Ms. Jenny about reading parts that Ms. Wells had previously given at the meeting. Ms. Wells admitted that Ms. Jenny's reading of the report gave more status to the report. In addition, Ms. Jenny gave Work Control duties to Ms. Wells, which pleased Ms. Wells since it utilized her engineering background. In that position, she would see to it that work requests submitted by various plant organizations were performed, and she began giving work control reports at the staff meetings, at the same staff meetings where she was giving less ATR reports.

Prior to the above August 5th meeting, Mr. Bell did attend staff meetings, and had worked closely with Ms. Wells on reports being generated by their organizations. Before that he saw no problems in the relationship between Ms. Wells and Mr. Hicks. She was one of the professional people that was assigned to a specific job to handle all of the managers' commitments, or corrective actions. Every week she took her report to the staff meeting, and then verbally related what was happening the coming week, month and year. It was always a part of their staff meeting, and she was always the one that was presenting it. There were no comments or actions by Mr. Hicks toward her at that time.

Mr. Bell testified that following the August 5, 1998 meeting, in March of 1999, after Ms. Wells testified before the NRC, and eventually in the summer after she gave an interview to the Department of Labor, he observed a change in the relationship between Ms. Wells and Mr. Hicks as well as that of both Ms. Morris and himself with Mr. Hicks. He stated:

> [Y]ou can tell a lot about a person by the demeanor. We would attend these meetings and from that point on it was almost like she was somewhat of an outcast to the room, or to the organization. His tone to her was ..., "Okay, Charlotte, we're giving you five minutes to get this done. Get in here and get it said and then you get out of here," or whatever. I mean, it was kind of like that. One time I did witness ... it was obvious to me there was some kind of problem there.

With regard to the changes made to Ms. Wells' reporting responsibilities in staff meetings after Ms. Jenny took over from Mr. Grace, Mr. Bell testified that it was noticeable to all that a clerical employee, secretary Shirley Bentley, had replaced Ms. Wells, a professional, in giving Ms. Wells' report, while Ms. Wells sat there "as though she's had a lobotomy." (T 201) Even questions asked had to go to Ms. Bentley, who had nothing to do with Ms. Wells' Corrective Action position. He observed Ms. Bentley being "very condescending" to Ms. Wells, trying to discredit her on little things in front of others in the staff meeting. Everyone knew that Ms. Wells had prepared the documents for the report. The report itself was then sent to the managers, but not sent to Ms. Wells. He testified: "And in my opinion, she was totally excluded from the authority oversight spokesperson for the corrective actions program," by having her name removed from the distribution list. Ms. Wells needed to have a copy of the final report since they would be calling her following the meeting to resolve issues, and Ms. Bentley "didn't have a clue what kind of comments were out there." (T 202) Ms. Wells was the only person that really knew. Bell finally asked Ms. Jenny if Ms. Wells could be put back on the list, so she eventually did. This directly affected his own work. It would also affect hers, and her performance ratings.

While Mr. Bell confirmed that the only observations that he had of Ms. Wells and Ms. Jenny was during the staff meetings for about an hour a week, and that his main objection was the way that Ms. Bentley was treating Ms. Wells, I credit these observations, but note that the Bentley attitude was a carry-over from Mr. Hicks, and that Ms. Jenny eventually changed that.

Mr. Hicks testified that Ms. Wells would give a report on what ATR's were coming due at staff meetings, what answers were being given on them, and those due in the coming week, and organizations responsible for them. She would prepare a hard copy of the report for everyone, and give it to them, there. After questions, if any, she would leave the meeting. He denied treating her differently or more harshly than anyone else in those meetings, and did not single her out to embarrass her or make her feel badly at them. He stated that there were times that he would confront her about what she needed to show in her report, but denied speaking to her, or anyone else, in a condescending manner. He did not believe that his relationship with her had deteriorated. In fact, he repeated what he said about being sorry to see him go; that he had helped her career, and was happy to have worked for him.

Mr. Hicks denied knowledge that Ms. Wells had called and talked to Shirley Bentley to say that she could not find him for a meeting. He did admit that there were times that he came in and was told Ms. Wells was looking for him.

Mr. Hicks testified that when Ms. Wells was removed from the ATR Screening Committee, Commitment Management Manager, Bill Sykes called him into his office and told him to start an initiative to reduce the number of people on that committee; that he (Hicks) felt that a smaller number could be just as effective, and that other would be freed-up for other tasks, so he agreed to appoint another person that he felt could perform the job. He did not remember discussing it with Ms. Wells, or that she objected to him about it.

In terms of his weekly face to face meetings with Ms. Wells, Mr. Hicks had originally set them up to discuss the ATR's, similar to what he had described in the staff meetings. He said that they started getting them under control, so the actual need for the meetings lessened. If something else came up, he would do that rather than meet with Ms. Wells, or might not meet with her if she was ill, so "they just kind of dwindled away over a period of time." He confirmed that by the end of 1999, the meetings, which lasted about 15 minutes, had subsided. The purpose of the meetings was to inform him of difficulties she was having getting people to respond to the ATR's, which would assist him, and assist her in what he had requested her to do on them. However, the number of delinquencies had dropped. It was not due to anger toward her Mr. Hicks testified, nor a desire to hurt her in any well. During the period of 1997 - 2000, Ms. Wells' absence record reveals a number of absences, including a cancer scare, all of which contributed to the decline in the individual meetings, he maintained.

For reasons stated above, I give very little weight to the testimony of Mr. Hicks.

Ms. Jenny testified that when she took over the organization, she changed the way they went over the Corrective Action assessment tracking reports in the staff meetings, and the way that Ms. Wells formerly read the statistics and talked about issues that were "coming down". Ms. Wells still prepared the reports, but Ms. Jenny did not read the statistics. She just went immediately to the issues that were coming out of those reports. Group Managers were responsible for the issues, then they reported back to Ms. Jenny and discussed with her whether

extensions were needed. As far as Ms. Jenny knew, Ms. Wells would give her reports and then leave Mr. Hicks' staff meeting, When she took over, Ms. Wells would stay for the full meeting. Instead of reviewing the statistics, she would not report on them, but put the page in front of the hard copy of the report for everyone to see it. Ms. Jenny asked Ms. Wells to create a "three-week look-ahead", focusing on the immediate three weeks of activity, and then Ms. Jenny would ask questions of the Group Managers about how they were planning on responding to each of the items. Managers often relied on Ms. Wells to get information, to transfer an item from Group A to Group B, and she continues to take care of all of those issues, and participates in those types of discussions. In the "round table" portion of her meeting, Ms. Jenny testified that she goes around the table and asks everyone what issues they have, at which time Ms. Wells reports on the work control issues that she's dealing with, or helps others in their self-assessments, and participates fully. Ms. Jenny did not recall Ms. Bentley, her secretary, telling Ms. Wells to leave or to stop taking notes or anything of that nature.

With regard to Ms. Bentley talking about reporting on ATR information while Ms. Wells was present at the meeting, as discussed by both Ms. Wells and Mr. Bell, Ms. Jenny recalled that when Ms. Wells went on Family leave for an extended period of time, Shirley had taken over the ATR reports, and getting the ATR reports, and handing them out to the Group Managers at the staff meetings. On the day that Ms. Wells came back to work, which was the day before or the day of the staff meeting, Ms. Wells did not hand out the reports, nor talk about them. Ms. Bentley did this because she had been the one who prepared them during that time period. Except for that instance, if Ms. Wells had been preparing the "reports," she would have been the one to discuss them and to state which ones were closed, or open, or whether she received the documents. This was limited to that meeting and not denied by Ms. Wells.

I find that there is substantial evidence that the initial curtailment of Ms. Wells' participation in staff meetings by Mr. Hicks was "adverse", and that it occurred in relation to activity that was protected. Her later participation in the meetings was initiated by Ms. Jenny unrelated to her initial reduced participation after her NCR deposition testimony. However, as stated above, I have credited the testimony of Ms. Jenny, and find that she was not deliberately continuing the atmosphere initiated by Mr. Hicks, although some of Mr. Hicks' attitutde continued to be reflected in Ms. Bentley.

Job Evaluations

Regarding her job performance evaluations, since 1995 Ms. Wells had received consistent "meets" and "exceeds" expectations and related wage increases, *i.e.*, she received a wage increase in1995 for that, with similarly based increases for the next three years, as follows:

Pre-"threat":

Her own Avg 5.34%:

February 27, 1995	4.902%	Consistently meets (exceeds)
February 26, 1996	5.800%	Consistently exceeds (exceeds)
February 24, 1997	3.949%	Effective Performance (meets)
February 23, 1998	6.712%	Commendable Performance (exceeds)

Post-"Threat":

Her own Avg 3.35% (Not 3.33 % Avg):

February 12, 1999	2.740%	Effective Performance (meets)

Testimony/Interview:

October 2, 2000	4.299%	Commendable Performance (exceeds)
October 1, 2001	2.999%	Meets Expectations (meets)

(CX 4; T 63)

Ms. Wells testified that she had received a "Commendable Performance" evaluation and a promotion to Grade 59, (a non-exempt position) in 1998 from Mr. Hicks, but complained that the "threat" from Mr. Grace took place in August 1998, and that she then received a "meets" despite the additional work. After she testified in the NRC deposition, she received the "Commendable Performance" and "exceeds" in October 1999, based on her 1999 performance. However, she testified that an "MP" ["EP" which equals a "meets"] was originally given and then marked through, (meaning that she was supposed to get - or would have gotten - a "Meets", but it was marked through,) on June 2, 1999, and a "CP" ("Commendable Performance") was written in and initialed by "L_K"? and then given Division Approval "by Mr. Hicks" in its stead, which resulted in a $4.29 increase rather than a $2.00 wage increase. (CX4, p. 4)

Mr. Hicks testified that David Sampson had given her the average rating to the CP rating. He marked it through and upgraded her from "Meets" to "Exceeds" because the ATR's were going down. He testified that he had no knowledge that she had testified three or four months before that, and it made no difference. (T 266) He acknowledged the "Meets" on the following year's report, which Complainant argued covered a part of the year in which Ms. Wells worked for Mr. Hicks, but which he denied based on the fact of the changed fiscal year. At any rate, I do

not see the effect, here. I find that the fact that Ms. Wells received the corrections to her merit rating, and the related wage increase, eliminated any alleged "adverse action", which, in my mind could only be tied to the NRC deposition testimony by virtue of its timing. Whatever may have prompted the initial "Meets" merit rating, however justified or unjustified, it has simply not been tied to that testimony, and, again, any inference that it was, has been negated by USEC management. I find that evidence of a violation in this action has not been established by a preponderance thereof.

When asked by the undersigned to explain the position behind the Complainant's theory that the "Meets" rating was violative of the Act, despite its change, Ms. Wells' counsel responded:

> Well, Judge, if they had not changed that -- what was originally given as a meets, then here is a lady whose past job performances had all been in the exceeds, and she would have gone for three consecutive periods of meets, meets, meets, which would have been far less than the work performances that she had earned and had had in the past.
>
> JUDGE PHALEN: But the other side of that, isn't that a positive, that it got changed?
>
> MR. LINDBLAD: Well, it is, but they may have changed it for a reason, and I think if the Court will sort of indulge me for a little while until we get some proof, that perhaps -- and our theory is that they changed it because of her testimony, and they were fearful that had they not changed it it would have been such a blatant act that they couldn't have -- we think everything that they've done is small, you know, little kind of things, overall effect, to attempt to get her to quit her job, piling more work on her, all these different things that they would have not blatantly made -- come out and just -- the fact that she testified, start giving her bad ratings. We think that they changed it because of that.... I offer you no other explanation, other than that.

I find that Complainant's theory did not materialize on the specific point of lowered evaluation, or on the addition of duties. This is the third USEC case that I have heard involving the time period of Ms. Wells allegations of discrimination by adverse action for protected activity under the ERA. I take notice of the fact that there had recently been two substantial layoffs which, in fact, were also referenced by Ms. Wells in her testimony. The atmosphere at USEC was stressful. Employees were, in general, fearful of what was going to happen when they went to work. Job eliminations were forcing those left to perform more work duties across the plant. However, from the evidence presented by her, I am not satisfied that the condition of Ms. Wells was any worse than that of any other person in the plant. If, in fact, certain things happened to add to that perception of hostility, especially when those effects were closely related in time to her

protected activity, her evidence did not do enough to establish that it persisted in a manner that could substantiate her theory of the case. Again, in fact, she ended up in a position that was better than when the alleged adverse actions began, and nothing has happened to revive them. Therefore, there is insufficient evidence to establish by a preponderance of the evidence that these actions constituted continuing violations of the Act.

As of the February 1999 work increases, while she had been promoted into an exempt position, meaning that she would not be paid overtime, she received a merit increase of 2.74%, plus additional pay for the promotion of an extra 4.979% , omitting the above referenced wage increase due to the promotion. As she stated it: she "figured that the white sheets [that she did put in] would explain it." (T 104-105; RX 5)

I did not understand what Respondent was trying to do here. It is questionable whether Ms. Wells left anything out, since she disclosed the promotion itself and the "white sheets" did explain the increase. I find that she either did not, or that she did not intentionally, fail to disclose that the promotion also carried a wage increase in her testimony itself. It was at least implied. What this demonstrated is another matter: It demonstrated that she was receiving at least routine promotions and pay increases throughout the alleged period of discrimination, and possibly more than that, which is an indicator militating against discrimination that must be taken into consideration in evaluating the alleged discrimination for her protected activity. This has been done, with the caveat that this is not conclusive that other established conduct might have been discriminatory when considered with her established protected activity.

In February 2000 she was again promoted by Mr. Hicks, initially and mistakenly to Security Analyst, (which was then corrected to "Corrective Action Analyst,") and that the latter resulted in skipping a pay grade, to an even higher pay grade. (T 102)

In the next evaluation period, in the year 2000, she received a "Meets Expectations" and a 2.999% increase, which was less than her 3.35% for the time period, without any apparent explanation. (T 66-67)

In October 2000, she also received an increase of 4.29% and was again rated "Commendable Performance." (RX 3) The above cited records of Ms. Wells show the year 2000 as a 4.29% increase, which is a "Post Threat" pay increase action. On February 7, 2000, she received a 6.2% increase related to the accompanying promotion. (RX 5) This latter increase was not included in her summary at p. 9. These resulted in increases of $1,680.00 and $2,172.00. (T 103)

She would have received substantially less than her average for the previous four years without the change on October 2, 2000. However, it was still below her average raise for the three previous years. I do not find that the change constituted substantial evidence of adverse action motivated by her protected activity during that time period. Without an analysis of what had happened to the rest of the workforce or comparable related positions, and the fact that it

corrected a chain of speculation regarding its adverse motivation cannot be sustained by a preponderance of the evidence.

Security Analyst

With regard to Ms. Wells' allegations regarding her promotion to Security Analyst from Corrective Action Analyst in February 2000, that is the only specific allegation of adverse action motivated by Ms. Wells' protected activity that came close to the 180-day filing provision of the statute, and highlights its importance. Prior to that Ms. Morris testified that she had been screaming for help, and had never had an opening for a Security Analyst. There was no one available. She had sent numerous e-mails and wrote ATR's on it to Pat Jenny, to Mr. Hicks and to Mr. Grace, about the fact that they did not have enough people in our department to perform the work. When she learned that Ms. Wells had been promoted to a Security Analyst I, she was very shocked, because that was a completely different animal than what Ms. Wells' job duties were that she was doing. Morris said that she would think that anyone working at the plant that was familiar with Ms. Wells' job and a Security Analyst, would know that there was a drastic difference in the job description.

Mr. Bell testified that Ms. Wells asked if he had heard anything at all about her possibly coming to work in his organization, which he confirmed that he had not. She then referred him to her "white sheet," showing her "Employee Status Change," to "Security Analyst I," which surprised him. Previously, he had an employee, C.T. Hall, a Physical Security Program Manager, with the actual title of "Securities Specialist" that retired in July of 1999. Prior to Ms. Wells' notice of promotion to Security Analyst in February of 2000, they were short handed, and he had discussed the situation with both Mr. Hicks and Mr. Grace at least four or five times, only to be told that they were downsizing and would not be able to employ anyone in that position. Mr. Hicks told him that they no longer had any money in their budget for her position, and that he did not want to hear anything more about it. Ms. Wells clearly did not have the credentials to perform the duties of Security Analyst, he stated. He had always interviewed and selected employees for his organization, and did not understand why Mr. Hicks did not come to him and discuss filling the position with her.

On February 21, 2000, Mr. Bell sent a letter to Human Resources (HR) about the mis-assignment. It went to several people at USEC, and to its corporate offices in Washington, D.C., in addition to being addressed to Pat Jenny, who was then being retrained to fill Mr. Grace's position, or it would have gone directly to him. (CX 6) He received an e-mail from a Mrs. Kerr in USEC's Portsmouth, Ohio office stating that there had been a "typographical error" in the assignment. However, Mr. Bell maintained that he still had a concern about what was happening there, for, as he observed:

> If you understood the process of positions at the plant, you can't make mistakes that way, so this could not have been simply a clerical mistake. Unless something has changed, ... all the positions at the Paducah site at the time have what they call a family of jobs, and security had their own unique positions. In my organization you had a -- a technical associate was the most entry level to a professional position. I'm not sure what level that was. I had a Security Analyst I, Security Analyst II, Security Officer and Security Specialist. There is no way in my honest opinion that you can take a person and make that kind of mistake. That would be like making Sammy Bell an engineer, when my expertise was in security. When the promotions were put in, ... that would have typically, in Charlotte's case, started at the top with Mr. Hicks, ...[and he] ... should have known that Security I positions weren't available," based on what Mr. Hicks had told Mr. Bell. It was a different family of positions. (T 195-198)

There has always been a lot of documentation about that position. One could not go from a security position to an engineer position without identifying a code that represents that position. It was his "honest opinion" that it could not have been just as simple as making a mistake on one piece of paper. Eventually, as a result of his concerns and his letter, the change was cancelled.

With regard to the nature of the questions of Respondent' attorney to Mr. Bell, while reviewing Claimant's Exhibit 6 (which was Mr. Bell's response to Ms. Bell's assignment to the Security Analyst I position), and his protest to the assignment, his questions seemed designed to get Mr. Bell to admit that the assignment may have been to just borrow the title and the funding from one family of jobs and give it to another, which Mr. Bell, in his responses basically denied.

I find the theory to be very far fetched and self defeating for Respondent. Such a unique change in procedure would have certainly been run by a manager such as Mr. Bell before being tried, if USEC management wanted it to work. I find that any such theory was mere afterthought, warranting an inference of questionable motive for its sponsorship. The responses of Ms. Pharis to Respondent's attorney's questions contradicts this theory. However, Mr. Bell also acknowledged that the appointment of Ms. wells to Security Analyst I did not make sense, and that when brought to attention to management, it was promptly changed. So the question is: Which of the competing theories, deliberate retaliatory change or mere mistake in name of assignment, is the truth? I find Ms. Pharis' testimony to provide clear and convincing evidence supporting the latter theory that it was merely a departmental mistake in the name of the assignment.

As the Security Classification Officer, I credit Mr. Bell's testimony in full. He was a consistent credible witness, with excellent demeanor and directness in responding to the questions. His suspicions about the mis-assignment were credible but in the end did not constitute sufficient evidence of motive for the action.

Ms. Jenny was the Security Manager, who was supervising Sammy Bell, when he came to her office with the typed letter regarding Ms. Wells purported promotion to Security Analyst. (RX 6, CX6) He had not been aware of the promotion, and told Ms. Jenny. Ms. Jenny took that information to Mr. Hicks. Ms. Jenny and Mr. Hicks held a discussion and both believed the promotion was a mistake. It was not their intent to promote Ms. Wells to Security Analyst, she should have been listed as Corrective Analyst I. They apologized to Mr. Bell. (T 294-298)

With regard to the mistaken promotion of Ms. Wells to Security Analyst, Joann Pharis acknowledged that immediately prior to Ms. Wells' promotion there had not been any consideration of security positions. To the undersigned, Ms. Pharis stated that she first learned of the action by email. She then pulled the Site and Facility file to see what promotions had been given, and what they had done as far as Ms. Wells was concerned. She had talked to Mr. Hicks about the Corrective Analyst position, back in August or September of the previous year, and had worked on them sometime between August and December. On February 9th, the error should have been caught earlier at a point in time, but it was not caught until she got the letter from Mr. Bell. Ms. Pharis admitted that because of all the questions surrounding the mistaken appointment, she assumed someone would think it was deliberate. However, she knew that it was not deliberate because she was the one that did it.

When asked by Claimant's counsel whether it was possible that the appointment of Security Analyst was not an error, but it was deliberate, she responded "No, it's not possible." Even though her handwritten sheet for non-exempt payroll (RX 8, p.3) was floating around since the previous year, she stated that "it hadn't been laying out there . . . it had been my work sheet." (T 374) It was planned to the extent that she had it written down but the entries were not made until a month-by-month basis, which was done by Lisa in February. Only Lisa had been given access to it, although Mr. Hicks would have if he asked for it, and she believed that he did not have it then, or until later in the investigation. When she made this draft, Mr. Hicks could have told her to put the security analyst in there, but he did not.

I credit Ms. Pharis' testimony. It was strong, consistent and uncontradicted. The mistaken assignment was corrected. Again, I do not see that there was a continuing adverse action against Ms. Wells. In addition, the promotion to Security Analyst took place on or about February 21, 2000, and it was resolved then, thus it did not occur within the 180-day time for filing a complaint under the ERA.

Evidence of Continuing Adverse Action Through Dates of Complaint and Hearing:

In terms of whether the alleged conduct has continued until the day of the hearing, Ms. Wells stated that it had subsided some since she filed with the Department of Labor, but that it has still continued in ways that on the average, would be hard to see, but does still continue. She maintains, however, that the overall hostile atmosphere that she alleged had been created at

USEC in response to her protected activity of giving depositions against it, still consists of the following:

> The environment in which I was in did not change. It was hostile. It was very fearful to go to work every day, wondering what was going to be done to you, what they were going to do to you, what they were going to put on you, what they were going to say to you, if what you was going to do was going to be right or wrong, because of these constant changes that they would come to you and you would change it, and no matter what was done, it did not meet what they said that they wanted, even though it was at their instructions, per instructions of doing this.

(T 123)

In terms of relief, Ms. Wells testified:

> I would like the hostile environment to stop. I don't want to be afraid to go to work anymore. I love working. I want to do my job to the best of my ability. And because of all of the stress, the horror, the fear that I have gone through, I feel like punitive damages are due, and I want my -- my salary and my benefits that I've earned and I'd like to see my attorney that's representing me, his fee to be paid, because if this had not happened I would not have to be doing this.

I find that Ms. Wells has not established by a preponderance of evidence that members of USEC management continued to engage in a course of adverse actions against her beyond those determined to have taken place by Mr. Grace and Mr. Hicks. While some may have been continued by non-management secretary Ms. Bentley, Ms. Jenny eventually corrected those, well before the year 2000.

CONCLUSIONS OF LAW

Applicable Law:

This case has been brought under the employee protection provisions of the Energy Reorganization Act. Its "whistleblower" provisions are designed to protect employees from retaliation for protected activities such as complaining, testifying, or commencing proceedings against an employer for a violation of this Act. *Devereux v. Wyoming Association of Rural Water*, 93-ERA-18 (Sec'y, October 1, 1993). The employee protection provisions of the Act have been construed broadly to afford protection for participation in activities in furtherance of

the statutory objectives. *See Devereux, supra, and Tyndall v. U.S. Environmental Protection Agency*, 93-CAA-6, 95-CAA-5 (ARB, June 14, 1998), final order approving settlement and dismissing complaint, 96-ARB-195 (ARB Sept. 25, 1996).

For reasons more particularly set forth herein, I find that Respondent suspected that Ms. Wells might have been going to raise particular issues or might have intended to begin activity protected under the ERA namely, the reporting of an attempt to cover-up the release of a classified document as unclassified for which she was threatened, did report the matter, and was subject to adverse actions, or proceedings, for matters that were protected under the Act. For reasons more particularly set forth herein, I find that Ms. Wells may have established a violation limited to the facts immediately surrounding the effects of that August 5, 1998 meeting, and the actions of Mr. Hicks after her direct 1999 NRC/DOL testimony, but that adverse actions alleged to have been motivated by protected activity thereafter, were limited to those of Mr. Grace in the meeting and Mr. Hicks after her testimony, but not included in any complaint timely filed under the ERA.

The purposes and employee protections of The Energy Reorganization Act ["ERA"], 42 U.S.C. Section 5851, address "whistleblower" protection against harassment and retaliation by an "employer" for employees involved in the nuclear industry, who: (1) notify their employer of an alleged violation, (2) oppose a practice that would be a violation of the Atomic Energy Act of 1954, (AEC) or (3) testify before Congress or any Federal or State agency regarding a violation of the AEC.

It states that "[n]o employer" may discharge or otherwise discriminate against any employee with respect to compensation, terms, conditions or privileges of employment because the employee engaged in the above activities, or has assisted or participated or is about to assist or participate in any manner in such proceedings as those listed, "or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954."

The ERA also requires that a complaint be filed with the Occupational Safety and Health Administration (OSHA) within 180 days of the actions being alleged as motivated by protected activity under the ERA. 42 U.S.C. § 5851.

Under the ERA, once the complainant establishes a *prima facie* case, the employer must establish by clear and convincing evidence that it would have taken the same unfavorable action, i.e. taken its unfavorable action for a legitimate, nondiscriminatory business reason, as it would have taken, in the absence of the employee's protected activity, rather than merely "articulating" or stating the legitimate business reasons for the action. The employer may be directed to "abate" certain effects of the employer's unfavorable personnel action (which means that the discriminatee may be ordered reinstated with back pay) except compensatory damages, pending court review of the final decision of the Secretary of Labor.

The implementing regulations governing employee complaints, 29 C.F.R. Part 24, provide at 29 C.F.R. §24.1 that "No Employer" may discharge or otherwise discriminate against any employee who has:

> (1) Commenced, or caused to be commenced, or is about to commence or cause to be commenced, a proceeding under one of the Federal statues listed in Section 24.1 or a proceeding for the administration or enforcement of any requirement imposed under such Federal statute;
>
> (2) Testified or is about to testify in any such proceeding; or
>
> (3) Assisted or participated, or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of such Federal statute, ... (Emphasis added)

- or, under the ERA, has notified the employer of, or, on notice to the employer has refused to engage in, any action prohibited by the Atomic Energy Act of 1954, or has testified concerning any of the provisions of the Acts in any federal or state proceeding, as stated in the above 1992 amendments. 29 C.F.R. Section 24.2(a)-(c).

In addition, as also stated above, 29 C.F.R. §24.7(b) states that a determination of a violation of the ERA may only be made under the statutory provisions that the "protected behavior or conduct was a contributing factor in the unfavorable personnel action..," and that the respondent has not demonstrated, "by clear and convincing evidence that it would have taken the same personnel action . . ." as it would have taken without such protected behavior. The rule provides that, upon finding a violation of the ERA, the determination "shall" contain a recommended order "that the respondent take appropriate affirmative action to abate the violation, including reinstatement to his or her former position, if desired, together with the compensation (back pay) . . . [etc.] . . . and, when appropriate, compensatory damages," with the compensatory damages not effective until final decision by the Administrative Review Board. 29 C.F.R. §24.7(c)(1)&(2).

Standards for establishing violations of the ERA:

Related to the establishment of jurisdiction under the ERA, a complainant in a "whistleblower" case must first establish that the respondent is an "employer" under the provisions alleged to have been violated under the Act, and satisfy the initial burden of establishing a *prima facie* case of discrimination by showing the following:

> (1) The "employer" is subject to the Act; 29 C.F.R. §24.2(a); ERA: 29 C.F.R. §24.5(b)(2)(ii)

(2) The complainant engaged in protected activity; 29 C.F.R. §24.2(b)(1)-(3): ERA: 29 C.F.R. §24.2(c)(1)-(3) and 29 C.F.R. §24.5(b)(2)(iii)

(3) The complainant was subjected to an adverse employment action; 29 C.F.R. §24.2 (a)&(b)

(4) The employer "knew" of the protected activity when it took the adverse action, ERA: 29 C.F.R. §24.5(b)(2)(ii), and

(5) An inference is raised that the protected activity was the likely reason for the adverse employment action. (*i.e.* ERA: the protected activity was a contributing factor in the unfavorable personnel action. 29 C.F.R. §24.5(b)(2)(iv)

See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089 (1981); *Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F. 2d 1159 (9th Cir. 1984); *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-46 , slip op. at 11 n.9 (Sec'y Feb. 15, 1995), *aff'd sub nom., Carroll v. United States Dept. of Labor*, 78 F.3d 352, 356 (8th Cir. 1996).

In general, under established case law, once having established the employer/employee status, the employee must establish a *prima facie* case, and under the ERA, that it was a contributing factor to the unfavorable personnel action. The respondent may rebut the complainant's *prima facie* showing by producing evidence that the adverse action was motivated by legitimate, nondiscriminatory reasons. Under the ERA, the respondent must produce clear and convincing evidence to establish a legitimate, nondiscriminatory reason for its action, while it may merely articulate the legitimate, nondiscriminatory reason under the other environmental statutes. Complainant then must counter respondent's evidence by proving that the legitimate reason proffered by the respondent is false or a pretext for the prohibited discriminatory reason. *See Yule v. Burns International Security Service*, Case No. 93-ERA-12 (Sec'y May 24, 1994)(Slip op. at 7-8). This burden now includes the entire analysis of the burdens of production, proof and shifting obligations in a Title VII, Civil Rights action under 42 U.S.C. Section 2000e cases to the relevant environmental "whistleblower" cases, as established under *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) and *Burdine, supra*, through *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742 (1993).

From the outset, under *Yule*, the complainant maintains the burden of proving by a preponderance of the evidence that he was retaliated against in violation of the law. *See St. Mary's Honor Center v. Hicks, supra; Darty v. Zack Company of Chicago*, Case No. 82-ERA-2 (Sec'y Apr. 25, 1983) (Slip op. at 5-9), *citing Texas Department of Community Affairs v. Burdine, supra*. Additionally, with specific relationship to the ERA, the Secretary stated in *Thompson v. TVA*, 89 ERA 14, (Sec'y July 19, 1993) that, under *Hicks* and *Burdine*, after the employer establishes its legitimate non-discriminatory rebuttal, the first determination that must be made is whether the evidence shows that the discriminatory reason is more likely the motivation

for the adverse reason. The rules clarify this obligation by adding in parenthesis, as set forth above, that the Complainant must prove that the protected activity was a "contributing factor in the unfavorable personnel action." Simply stated, the complainant continues to bear the burden of proving allegations of discrimination by a preponderance of the evidence.

This view is no different than what has recently been clearly restated by the United States Supreme Court in its review of *Hicks* in *Reeves v. Sanderson Plumbing Products, Inc.* 530 U.S. 133, (2000), wherein the Court assumed (without deciding) application of the *McDonnell-Douglas/ Hicks* standards to court analysis of alleged violations under the Age Discrimination in Employment Act (ADEA). Indeed, the Court in *Hicks* adopted its prior 1981 standard as set forth in *Burdine, supra,* that "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253 (as now reinforced in *Reeves, supra).*

In the present case, weighing the impact of settled case law and the rules set forth at 29 C.F.R. Part 24, which codifies the above case law rules, Complainant has attempted to establish that she was engaged in related protected activity and that a continuing course of adverse action has taken place against her, through the date of filing the complaint at OSHA and the date of the hearing, *i.e.*, her mistreatment, consisting of threatening speech, removal from meetings, addition of duties, marking down her evaluations and general inappropriate mistreatment, an inference has been established that his protected activity was a contributing factor to this misconduct. USEC has articulated a facially "legitimate, non-discriminatory" business reason for the unfavorable actions, in that it would have taken the same actions against Ms. Wells as it would have taken without her protected behavior.

While the "legitimacy" and "non-discriminatory" basis for the actions are called into question by the challenge to them of Ms. Wells, as either lacking credence or constituting a pretext for the action under the ERA burden shifting/ production standards, the result is the same: once the hearing has taken place, and the *prima facie* case presented with the business reason for the action established by the employe , the burden shifting analysis drops away, and Ms. Wells continues to have the burden of establishing whether the evidence shows that the discriminatory reason is more likely the motivation (the contributing factor) for the adverse action. In other words, she still must establish that her protected conduct remained a contributing factor in her unfavorable personnel or adverse action, and she was discriminated against in violation of the Act by a preponderance of the evidence.

For the reasons set forth herein, Ms. Wells appears to have met her burden of establishing a substantial, reasonable basis for her belief that her testimony before the NRC and/or the DOL was the motive for certain various acts alleged against the Respondent. She has possibly established a violation of the ERA by a preponderance of the evidence. However, I find that she has failed to bring specific actions within the 180-day filing date of the ERA. I find that the August 5, 1998 threat of Mr. Grace regarding classified matter disclosure was ambiguous and could have been construed to affect her disclosure of protected matters that he suspected might be

revealed by Ms. Wells. However, I also find that, with the exception of Mr. Grace's threat and certain actions taken by Mr. Hicks, the employer has established by clear and convincing evidence that the actions otherwise stated by Ms. Wells were for legitimate business reasons, or that they would have taken the same unfavorable actions or personnel actions in the absence of her behavior, and further, that those alleged against Mr. Grace and Mr. Hicks occurred outside of the 180-day time period for filing a complaint.

Since this case has been presented to the undersigned after a full hearing on the matter, the Complainant's ultimate burden of proof remains: to establish the jurisdiction of the Administrative Law Judge to hear this matter, and then that her allegations of violations of the Act are established by a preponderance of the evidence, as the paramount standard.[6] Therefore, the following step-by-step analysis is presented for the sole purpose of order in understanding the various principles involved in evaluating the evidence in this case.

1. Jurisdiction:

It is axiomatic that a court must have jurisdiction over the claim to make its determination. Key to such a consideration is the statute of limitations for filing the claim; in the present case the 180-day time period under 42 U.S.C. § 5851. In the present matter, Complainant alleges that a continuing course of conduct, which commenced in August of 1998, continued through the date of filing the complaint on October 14, 2000, and through the date of this hearing. This requires a complete analysis of the facts, which follows, and will determine the final ruling that the matter was untimely filed and that the case must be dismissed.

On October 14, 2000, Charlotte Wells filed a complaint of discrimination under Section 211 of the Energy Reorganization Act (ERA) of 1974, 42. U.S.C. §5851, at the Atlanta, Georgia Office of the Occupational Safety and Health Administration (OSHA). (ALJ X 3). The complaint was dismissed by that office on September 17, 2001 based, in part, on Ms. Wells having filed the complaint outside of the 180-day time-filing requirements of Section 211 of the ERA concerning the following: (1) the alleged threat by Mr. Andrew Grace, in November 1998, later found to have been at a meeting on August 5, 1998; (2) another, in the alleged elimination of her participation in a weekly one-on-one meeting with the Functional Organization Manager, Charles Hicks, in March of 1999; (3) the alleged lowering of her performance evaluation in February of 1999; (4) her alleged mis-promotion to Security Analyst in February of 2000; (5) the alleged intimidation of her in February of 2000, and (4) her alleged removal as Site and Facilities representative from the Daily Screening Meeting in November of 1999; all f which I find to have had some basis in fact, and some of which, but not all, have been proven to be for protected activity. (ALJ X 4) The determination also found that she had failed to establish a *prima facie* case as to other allegations, which will be discussed in detail.

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[6] *See*, ALJ's comment in *Niedxielski v. Baltimore Electric, Co.*, 2000-ERA-4 (July 13, 2000), to the effect that, "working through the *prima facie* case is useful since the ultimate burden of proof still involves many of the elements covered in the *prima facie* analysis...."

The important determination herein will concern the issue of whether those adverse actions proven to have been motivated by protected activity which occurred before the 180-day filing deadline, may be used as background evidence or to establish a continuing course of action for established "current adverse actions" and their motivation linked to established protected activity. Therefore, the elements of the claim will be discussed in detail.

2. USEC's "Employer" Status:

Under 29 C.F.R. § 24.2 (a) the complaining employee must establish that the alleged discriminating employer is an "employer" subject to the Act. Respondent has stipulated that it is engaged in interstate commerce and is an employer subject to the provisions of Section 11 of the Energy Reorganization Act herein, ERA, of 1974, 42 USC Section 5851.

I find that the belief of Mr. Grace that Ms. Wells possessed information that she would reveal to the NRC and Ms. Wells' testimony before the NRC has invoked NRC regulatory considerations. In so doing, it has necessarily implicated the broad public health and safety considerations meant to be included within the scope of the ERA, and the broad remedial purposes of the ERA. As stipulated, I find that USEC is an "employer" under the ERA, and that there is a sufficient nexus between Ms. Wells' conduct and the purposes of the ERA to extend coverage to her activities thereunder.

3. Complainant's Protected activity:

a. General Rules:

The environmental statutes all protect an individual's participation in activity which furthers the respective statutory objectives. *See Devereux v. Wyoming Association of Rural Water,* 93-ERA-18 (Sec'y, October 1, 1993), *supra, and Jenkins v. U.S. Environmental Protection Agency,* 92-CAA-6 (Sec'y, May 18, 1994). In other words, the Acts protect the reporting of environmental or safety violations. *See Johnson v. Old Dominion Security,* 86-CAA-3,4-5 (Sec'y May 29, 1991). Protected activity is broadly construed under the environmental whistleblower protection acts. *See also, Guttman v. Passaic Valley Sewerage Commission,* 85-WPC-2 (Sec'y March 13, 1992). Concerns that "touch on" the environment can be considered as "protected activity." *See Dodd v. Polysar Latex,* 88-SWD-4 (Sec'y 22, 1994).

Internal complaints are also considered, pursuant to the environmental acts, as "protected activity." In *Hermanson v. Morrison Knudsen Corp.,* 94-CER-2 (ARB June 28, 1996) the Board held that "[i]nternal safety complaints are covered under the environmental whistleblower statues in the Eighth Circuit, the Fifth Circuit and every other circuit. *See* Amendments to the ERA in the Comprehensive National Energy Policy Act of 1992 (CNEPA), Pub. L. NO. 102-486, 106 Stat. 2776," and Dodd, *supra* (CERCLA & SWDA); *Reynolds v. Northeast Nuclear Energy Co.,* 94-ERA-47 (ARB Mar. 31, 1997) (ERA); *Passaic Valley Sewerage Commissioner's v. United States Department of Labor,* 992 F.2d 474 (3d Cir. 1993) (CWA); *Wagoner v. Technical Products,*

Inc., 87-TSC-4 (Sec'y Nov. 20, 1990) (TSCA); *Guttman v. Passaic Valley Sewerage Commissioners*, 85-WPC-2 (Sec'y Mar. 13, 1992). The Board further noted in *Hermanson* that the only exception to this rule at that time prior to the 1988 amendments, had been "for cases filed in the Fifth Circuit under the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. Section 5851 (1988), prior to October 24, 1992." *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984)

In addition, an informal complaint, such as verbal communication, constitutes "protected activity." *See Nichols v. Bechtel Construction, Inc.*, 87-ERA-44 (Sec'y Oct. 26, 1992) (employee's verbal questioning of foreman about safety procedures constituted protected activity), *aff'd* in *Bechtel Construction, Inc. v. Secretary of Labor*, 50 F. 3d 926, 931 (11th Cir. 1995) (stating that "general inquiries regarding safety do not constitute protected activity," but a pattern of inquiries regarding how to handle contaminated material can add up to protected activities."); *see also Dysert v. Westinghouse Electric Corp.*, 86-ERA-39 (Sec'y Oct. 30, 1991) (employee's complaints to team leader protected); *Crosier v. Portland General Electric Co.*, 91-ERA-2 (Sec'y Jan. 5, 1994) (complainant's questioning his supervisor about an issue related to safety constituted protected activity). The environmental "regulations make it clear that a formal proceeding is not required in order to invoke protection of the Act." *Kansas Gas & Electric Company, v. Brock* , 780 F.2d 1505, 1512 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011, 92 L.Ed.2d 724, 106 S.Ct. 3311 (1986).

To constitute protected activity, however, the substance of the complaint must be "grounded in conditions reasonably perceived to be violations of the environmental acts." *Minard v. Nerco Delamar* Co., 92-SWD-1 at 5 (Sec'y Jan. 25, 1994). It is insufficient to show that the environment may be negatively impacted by the employer's conduct. *Decresci v. Lukens Steel Co.*, 87-ERA-13 (Sec'y Dec. 16, 1993) (the environmental whistleblower provisions are intended to apply to environmental and not other types of concerns).

b. Specific Protected Activies:

Respondent stipulated that during and subsequent to March 1999, the Complainant engaged in protected activity. The specific protected activities in the present matter of Ms. Wells consisted of, but were not limited to, the following action: Giving testimony before, or being interviewed by the NRC and the DOL relative to an alleged NRC violations.[7]

[7]Complainant proposes that the subject matter of Ms. Wells' testimony before the NRC was that it was "regarding an incident occurring during a meeting on August 5, 1998 at USEC's facility involving Charles Hicks, Andrew Grace, Ron Whiteside, Sammy Bell and Janice Morris and the subsequent telephone threat made by Andrew Grace to the Claimant." (Complainant's Proposed Findings of Fact (CPFF), p. 2)

4. Adverse Action:

An "adverse action is simply something unpleasant, detrimental, even unfortunate, but not necessarily (and not usually) discriminatory." *Stone & Webster Engineering Corp. v. Herman,* 115 F.3d 1573 (11th Cir. 1997). "Adverse action" encompasses any discrimination with respect to an employee's compensation, terms, conditions or privileges of employment. *DeFord v. Secretary of Labor,* 700 F.2d 281 (6th Cir. 1983).

I find that the implied threat of Mr. Grace ambiguously encompassed protected activity in addition to the individual adverse actions alleged above in response to acts of protected conduct and activity, [which warrants a specific remedy or remedies] while it did not result in loss of income or benefits, it frightened her and others around her, causing them to fear.

In addition to the above specific findings of adverse actions set forth in the discussion of protected activity, I find the following to also constitute adverse action against Ms. Wells: Mr. Hicks' treatment of Ms. Wells in staff meetings, her removal from the staff meetings, the elimination of one-on-one meetings with him, her removal from screening meetings, and her lowered evaulations.

5. Knowledge of Protected Activity:

Respondent's knowledge of a protected activity at the time of its adverse action is an essential element of the complainant's *prima facie* case. *See Morris v. The American Inspection Co.,* 92-ERA-5 (Sec'y Dec. 15, 1992), slip op. at 6-7. Since Respondent has stipulated to protected activity, knowledge is appropriately inferred. Complainant has sustained this burden.

6. Motivation and Timing:

A complainant must produce sufficient evidence to raise an inference that the motivation for the adverse action was her protected activity. Temporal proximity between the whistleblowing activities and the adverse actions is sufficient to establish a *prima facie* case. *Tyndall v. U.S. Environmental Protection Agency,* 1993-CAA-6, 1995-CAA-5 (Administrative Review Board, June 14, 1996), final order approving settlement and dismissing complaint, 96-ARB-195 (ARB Sept. 25, 1996), *citing County v. Dole,* 886 F.2d 147 (8th Cir. 1989); *Bartlik v. United States Department of Labor,* 73 F.3d 100 (6th Cir. 1996). However, in *Hadley v. Quality Equipment Co.,* 91-TSC-5 (Sec'y Oct. 6, 1992), the Secretary indicated that although a sequence of events occurring in a short period of time may invoke an inference of causation, it is still necessary to examine the events as a whole in determining whether the ultimate question of whether a complainant has proved by a preponderance of the evidence that the retaliation was a motivating factor in the adverse action. In other words, an administrative law judge may decline to find retaliation, notwithstanding the short proximity of events, if other facts show that complainant would have been fired had he not engaged in the protected activity. *Hadley, supra,* (employee engaged in a stream of obscene behavior immediately prior to adverse actions by

employer); *Jackson v. Ketchikan Pulp Co.,* 93-WPC-7 (Sec'y Mar. 4, 1996) (complainant was fired for being out of his work area rather than his protected activity even though there was temporal proximity between the protected activity and discharge).

In the present case, motivation may be inferred from the timely sequence of events related to the threat that Mr. Grace made to Ms. Wells, the testimony of Ms. Wells before the NRC in 1999, and the actions of Mr. Hicks regarding the various meetings and his changed attitude toward her.

7. The "legitimate and non-discriminatory" business reasons:

The respondent has the burden of producing evidence to rebut the presumption of disparate treatment established by complainant's *prima facie* case, by presenting evidence that the alleged disparate treatment was motivated by legitimate, nondiscriminatory reasons for the adverse action. *See Burdine, supra.* This must be established by clear and convincing evidence under the ERA. The complainant, however, retains the ultimate burden of proof. She must establish by a preponderance of the evidence that respondent's adverse actions constituted discrimination for her protected activity. Here, I have concluded that it was Ms. Wells' protected activity that was the motivating factor in the threat of Mr. Grace and the actions of Mr. Hicks. *Dysert, supra* and *Burdine, supra*.

Respondent presents the following as its justification for the "adverse action: Respondent contends that Wells has presented no evidence that she was threatened by Mr. Grace for protected activity or that her removal from the meetings by Hicks or lowering her evaluations was motivated by an improper intent of management. It further contends that there was no timely adverse action against Ms. Wells within the 180-day time period for filing a complaint.

On this, I have made the following findings of fact: I find that while the above actions of Mr. Grace and Mr. Hicks were retaliatory, Respondent has established by clear and convincing evidence that from the time of the replacement of Mr. Hicks by Ms. Jenny, there has been no adverse action against Ms. Wells motivated by her protected activity; and that any carry-over of negative attitude by Ms. Bentley, Mr. Hicks' secretary, was disbursed by Ms. Jenny well before the 180-day filing period.

8. The 180-Day Time Period for Filing the Complaint:

The events of August 1998 - November 1999, whether protected or not, are clearly outside of the time limitations of Section 211 of the ERA for purposes of establishing specific violations in that time period. However, actions and threats from that time period may be considered as background evidence in relation to allegations of conduct occurring within that 180-day period before the filing of the complaint on October 17, 2000. This would include all such conduct from April 20, 2000 through October 17, 2000. The only conduct established to have taken place within that time period was the continued elimination from Staff Meetings, and

other such meetings, and the change in some job duties. No other retaliatory acts are alleged to have occurred during that time period.

I have evaluated the evidence and found that Mr. Grace did, indeed, threaten Ms. Wells during the meeting of August 5, 1998; that he feared that she might make a report on what he suspected Ms. Wells overheard in that meeting; that what he suspected that she overheard was not only classified information, concerning which he had managerial discretion to warn her about, but that it included information concerning what might have been construed as an attempt to cover-up the sending of a classified document as unclassified, and that this action had already constituted a security breach of Nuclear Regulatory Commission regulations, with possible security, and therefore, safety implications.

It is my determination that such an alleged "cover-up" action would have constituted a violation of the ERA, had it been timely filed. It was not, so there could not be a finding of a specific violation effective as of that date.

However, the threat itself had time implications beyond that date, and would run to any retaliatory conduct found to be related to that threat. Therefore, subsequent conduct, including adverse actions against Ms. Wells, must be considered in light of that threat, including removal from meetings; removal and addition of job duties; changes of evaluations; and affect on promotions and pay.

With regard to the actual threat by Mr. Grace to Ms. Wells itself, I conclude that any violation of the Security Plan being argued by those charged with the protection of such plans at USEC potentially involve all security matters at USEC; that the Security Plan's security matters do encompass the heath and safety of all of the employees at USEC; that discrimination against any of those charged with enforcement of the USEC Security Plan, for engaging in action to enforce the Plan is engaged in "protected activity" within the meaning of the ERA; that anyone who inadvertently overhears conversations concerning the actions to enforce the Plan is also engaged in such "protected activity"; that anyone who threatens such an employee concerning the revelation of information learned from such a meeting to any person who would be authorized to receive such information, has engaged in an adverse action motivated by such protected activity, and a violation of the ERA, and that any person who threatens, or otherwise engages in an adverse action against an employee because of a suspicion that the employee will reveal the contents of the conversation to anyone else, including those authorized to receive such information, is engaged in a violation of the ERA.

To the extent that any supervisor suspects that an employee will report violations of its Security Plan to authorized officials, whether the result of direct participation in the conversation, or having inadvertently overheard it, and the supervisor threatens or otherwise takes adverse action against that employee to not to disclose the content of the conversation, it is my determination that the threat or action violates the letter and the spirit of the ERA. I find that Mr. Grace suspected that Ms. Wells would report the content of the overheard conversation

concerning the cover-up of the unauthorized disclosure of a classified document as unclassified in violation of USEC's Security Plan, and that in his conversation with her, in which he stated that if he heard of such a matter at any indefinite time in the future, he would know who it came from and who to go to; that, in so doing he threatened her by implication with indefinite adverse actions, and that this evidence constituted *prima facie* evidence of a violation of the ERA at the time that it occurred.

At the time of the alleged adverse threat in 1998, the conversation was not speculative. The classified document had already been submitted to Oak Ridge; Ms. Morris had been notified of the breach, and one hour had passed since the breach had occurred, and the parties were notified of it The sole issue being discussed was how to "get around" the obligation to have reported (or to report) it. (*i.e.*, I find: to cover it up.) Mr. Grace, upon learning that Ms. Wells was in the hall, outside the open door to the room where it was being discussed, suspected that she would report it. He threatened her to not do so. He did not limit his threat to the disclosure of classified matters to persons not cleared for such information, but made it broad enough to encompass anyone, including officials entitled to receive such information. In so doing, he frightened, not only Ms. Wells, but the meeting's authorized participants urging disclosure, Mr. Bell and Ms. Morris.

I have also found that the actions of Mr. Hicks in his changed attitude toward Ms. Wells; his elimination of her from the Staff Meetings, Screening Meetings, and one-on-one meetings were retaliatory for protected activity, but that additional duties and alleged changed evaluations either were not, or were not established to have been so motivated.

Returning to the 180-day time limit for filing a whistleblower complaint under the ERA: Mr. Grace placed no limit on his implied threat of indefinite adverse action, however indefinite in time, place or degree. While the 180 days had long since expired (on or about February 1, 1999, if one was counting the days to file an ERA complaint over the threat) adverse actions established by a preponderance of the evidence to have been related thereto, would have also constituted a *prima facie* violation of the ERA, in the context of utilizing the August 5, 1998 threat as background evidence to the evaluation of that involving the adverse action. Likewise, I find that any action so related to the threat, or to any other intervening protected activity by a preponderance of the evidence, would, again, have constituted a violation of the ERA.

Citing a series of cases involving the doctrine of equitable tolling, *Archer v. Sullivan County, Tenn.*, 129 F.3d 1263 (6th Cir. 1997), *citing Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990), *cert. denied*, 501 U.S. 1261 (1991), and in particular *Erickson v. U.S. Environmental Protection Agency*, ARB Case No. 99-095, ALJ Case No. 99-CAA-2 (July 2001) (date complainant discovers he has been injured); *Pantanizopoulos v Tennessee Valley Authority*, 96-ERA-15 (ARB Oct. 20, 1997 (date Complainant discovered he had been wrongly injured), Complainant proposes that she did not realize that she had been injured "until she found out about Hick's involvement in the meeting and his meeting with Grace," in this case in August

2000, when she found out that Mr. Hicks was in the August 5, 1998 meeting with Mr. Grace when he made his threat to her.

She then attempts to link that knowledge to the theory of continuing violation, as set forth in *Bechmeier v. Tombstone Pizza*, 96-STA-33 (ALJ Nov. 25, 1996) where there is a course of related discriminatory conduct and the charge is filed within the requisite time period after the last alleged discriminatory act." (Ct. Br., pp. 16-17)

Commencing with the last theory first, even if the "knowledge" proposition is maintained, I find that there is no specific discriminatory act established to have occurred within the 180-day time period, under the "course of related conduct" theory of the case. There are two categories, beside demeanor and chilled atmosphere, (and which, themselves, are effects that must be found to have emanated from some specific act), that have been alleged to have constituted continuing discriminatory acts under this theory: (1) Those involving attendance at staff and other meetings, and (2) Those involving evaluations and promotions.

As to the first, I find, based upon my crediting of the testimony of Ms. Jenny, that any effect arising out of the retaliatory conduct of Mr. Hicks had been obviated by her unbiased treatment of Ms. Wells when she took over the position formerly occupied by Mr. Hicks as her supervisor, and that effects that may have been present in the attitude of Mr. Hick's former Secretary, Shirley Bentley, were not actions of Ms. Jenny or USEC, but those of Ms. Bentley, which were gradually overcome by Ms. Jenny. She immediately began to work Ms. Wells back into the Staff Meetings, and developed a different manner in utilizing the information supplied by Ms. Wells. After Ms. Jenny took over, there was no substantial evidence that the one-on-one or screening types of meetings continued in any other form, or that Ms. Wells was excluded from such meetings by Ms. Jenny, so I find no continuing violation involved in any such exclusion. In terms of related inclusion on distribution lists, the evidence is that when the matter was raised to Ms. Jenny, Ms. Wells was included on necessary lists.

With regard to the second matter, that of evaluations and promotions, I find no evidence of any continuing conduct that would rise to the level of adverse action due to protected activity. The last issue concerning the mis-promotion of Ms. Wells to the Security Analyst position took place on February 21, 2000, and, I find, was due solely to the inadvertent designation by Ms. Pharis, whose testimony I have also credited. The fact is that the mis-promotion was corrected within 24 hours of the action, and I find that Respondent has established its business justification for the action by clear and convincing evidence.

With regard to the first theory, the date complainant discovers she has been injured, Complainant proposes that the theory relates to the actor, rather than the action, when all of the cases cited involve the action itself. In a novel approach to the subject, Complainant charges that she did not connect the actions that were happening to her to the threat made by Mr. Grace in 1998, and to her testimony before the NRC and DOL in 1999, until she learned in August of 2000 that Mr. Hicks had been present in the August 5, 2000 meeting room. This may have been

so. I do not discredit Ms. Wells' thoughts on the matter. However, the adverse actions traced herein were actions of USEC management, caused in substantial part by Mr. Hicks, and known to Ms. Hicks at the time they occurred. He was not only a member of management, but a known, close friend of Mr. Grace. If the change in Mr. Hicks toward Ms. Wells was as dramatic as described by her, especially after her NRC/DOL testimony in March 1999, she possessed sufficient information to have warranted the same ERA whistleblower charge for the same conduct that is alleged here, without knowledge of Mr. Hicks' presence at the August 5, 2000 meeting when Mr. Grace made his threat to her.

Complainant employs the doctrine of "equitable tolling" to avoid the bar of the statute of limitations. Complainant must expend all due diligence to obtain vital information bearing on the existence of her claim before the doctrine of equitable tolling can preserve her claim. *See Cada*, 920 F.2d at 451. The factors to be considered in this connection include the following: (1) whether Complainant lacked actual notice of her rights and obligations; (2) whether she lacked constructive notice; (3) the diligence with which she pursued her rights; (4) whether Respondent would be prejudiced if the statute were tolled; and (5) the reasonableness of the Complainant's remaining ignorance of her rights. *EEOC v. Kentucky State Police Dep't*, 80 F.3d 1086, 1094 (6th Cir. 1995), *cert. denied*, 117 S. Ct 385 (1996).

It is "well-settled that ignorance of the law alone is not sufficient to warrant equitable tolling." *Rose v. Dole*, 945 F.2d 1331, 1335 (6th Cir.1991). The statute itself gives Complainant constructive notice of the fact that Respondent was violating her rights under the ERA and of the deadline for filing suit. Complainant did not pursue her rights with diligence. She was aware of the adverse actions taken against her by Mr. Hicks at the time such actions occurred. In light of the adverse actions taken against her and her testimony before the NRC, it is not reasonable for Complainant to have remained ignorant of her rights for as long as she did. Complainant's discovery of Mr. Hicks presence in the meeting on August 5, 1998, was not vital information bearing on the existence of her claim. She was aware of the final and definitive effects of the actions taken against her by Mr. Hicks at the time he engaged in them. She should have been aware of her claim long before October 14, 2000. The doctrine of equitable tolling does not save Complainant's claim here.

CONCLUSION

Here, I find that Complainant was, and continues to be an employee of the Respondent employer covered by the provisions of Energy Reorganization Act; that she was a member of the class of employees covered by the whistleblower protective provisions of that Act; that she was engaged in protected activity under the Act; that adverse actions were taken against her by certain managerial employees of the Respondent; that none of those adverse actions occurred within the time period for the filing of the complaint, and that the complaint must be dismissed. Therefore,

IT IS THE RECOMMENDED ORDER that the complaint be dismissed for failure to meet the 180-day time for filing requirements of the provisions of 42 U.S.C. Section 5851.

A

THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief, Administrative Law Judge. *See* 29 C.F.R. § 24.7(d) and 24.8.